IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 92

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No.

CLUB RAMON, INC., *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CLUB RAMON, INC., your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled cause on November 15, 1961.

OPINIONS BELOW

The opinion of the court below (Appendix A(1), *infra*, pp. A1-A7) has not yet been reported. The letter opinion of the district court (Appendix A(2), *infra*, pp. A8-A9) is unreported.

JURISDICTION

The judgment of the court below (Appendix B, *infra*, p. A9) was entered on November 15, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, where the issue whether taxpayer's establishment furnished a public performance for profit within the meaning of § 1700(e), I.R.C. 1939 (now §§ 4231(6) and 4232(b), I.R.C. 1954) was submitted to a jury under appropriate instructions, the appellate court may disregard the jury's verdict in taxpayer's favor on the ground that the latter was not conducting a club as defined in § 101(9), I.R.C. 1939 (now §§ 501(a) and 501(c)(7), I.R.C. 1954).

2. Whether, where the evidence was in sharp conflict as to whether the general public was in fact admitted to taxpayer's establishment, and the issue whether that enterprise was furnishing a public performance for profit was duly submitted to the jury and determined in the negative by its verdict, the appellate court may disregard that verdict on the ground that there was nothing to go to the jury.

STATUTES INVOLVED

The provisions of the Internal Revenue Code, 1939, here involved, and the corresponding provisions of the Internal Revenue Code, 1954, are set forth in Appendix C (*infra*, pp. A10-A13).

STATEMENT

Petitioner, hereinafter sometimes called "Taxpayer," sued for a refund of $386.65, representing excise taxes assessed against it under § 1700(e), I.R.C. 1939 (*infra*, p. A11) in respect of the month of October 1951 (R. 3-9). It is clear that the outcome of the present action will determine petitioner's tax liability in respect of such taxes for the period October 1951 to December 1957, inclusive, the aggre-

gate amount of which, including penalties and interest, is $24,729.91 (Appendix A(1), *infra*, p. A2; see R. 5).

The case was tried before a jury, to which was submitted the issue whether taxpayer's business was furnishing a public performance for profit as defined in the cited statute. On that issue, the jury found for the taxpayer (R. 330), and judgment was accordingly entered against the United States (R. 331-333).

The United States then moved for a new trial (renewing its trial motion for a directed verdict at the close of all the testimony, R. 312-314), on the ground that taxpayer's enterprise was not a bona fide club operated in a private place, but on the contrary was one conducted for profit in a public place (R. 334-338). This motion was denied by the district court on the authority of *United States* v. *Lambeth*, 176 F. 2d 810 (C.A. 9), in an opinion set out below, *infra*, pp. A8-A9, and incorporated by reference into its final order (R. 339-340).

On appeal, the Fourth Circuit reversed, essentially on the ground that, since the Club Ramon was admittedly not a club as defined by § 101(9), I.R.C. 1939, there was nothing to go to the jury. The Fourth Circuit refused to follow the Ninth Circuit's *Lambeth* decision, on which the district court had relied, and similarly refused to follow other decisions in accord therewith.

A. Taxpayer's Operations

For present purposes, the facts regarding taxpayer's operations may be taken from the opinion below (*infra*, pp. A2-A5):

"Club Ramon, Inc. is a corporation established under the laws of West Virginia on October 13, 1951. It is, in effect, a one-man enterprise owned by Raymond O. Mattee * and

* Actually "Matte" (R. 201), but consistently misspelled throughout the opinion of the court below.

carried on by him for profit in Bluefield, W. Va. At its inception 20 shares of stock of the par value of $100 per share were issued of which 18 shares were issued to Mattee, 1 share to his wife, and 1 share to Dudley E. Cruise who works regularly as a clerk with the Bluefield Supply Company during the day but also acts as assistant to Mattee in the evening in the operation of the Club Ramon. These three persons constituted the Board of Directors of the corporation. Mattee became the President and Treasurer, his wife, Secretary, and Cruise, Vice President. The wife died in 1956 and the position of Secretary has not been since filled.

"The certificate of incorporation states that the purpose of the corporation is to operate 'a private dinner and supper club for the service of food and beverages.' The by-laws of the corporation provide that the club shall be operated as a private club for the use of its members and their guests and that the Board of Directors shall prescribe the requirements for membership and issue appropriate identification to the members. No such regulations, however, have been passed and no attempt has been made to organize a private club in the ordinary meaning of that term. The selection of members has been entirely in the hands of Mattee and the evidence of membership is a membership card issued by Mattee bearing the member's name. The privileges of members consist in the right to have access to the Club and to partake of its entertainment for a price but no meetings of the members are held and the members have no voice in the selection of members, no control of the operation of the Club and no share in the profits. In short, as witnesses for the taxpayer testified, the Club is Mattee and the profits are his.

"The place of business is open after 5:30 P.M. in the evening. The name Club Ramon appears on the canopy over the sidewalk which shelters the entrance. The rooms include a lounge, reading and television room and a dining

room containing a small area for dancing. Music is provided by a tape machine, a juke box and an electric organ. Members are permitted to consume alcoholic drinks on the premises which they may provide themselves and keep in a locker if they desire, or may purchase by the drink from the Club. In these respects the enterprise is similar to the business organization commonly known as a night club which is defined in Webster's New Collegiate Dictionary as 'a commercial establishment operating at night to supply food and entertainment to its customers.' In fact, the telephone company in Bluefield lists the taxpayer as a night club in its classified directory. Mattee and Cruise testified that they had no knowledge of this listing and that the business was not advertised in any other way.

"The contention of Mattee that he does not furnish a public performance and does not operate a public place for entertainment is based almost entirely on restrictions imposed by him upon entrance to his establishment. The outside door of the restaurant is locked and opened only in response to a buzzer and usually but not always admission is restricted to persons bearing a membership card inscribed with their names and to their guests. Approximately 400 membership cards have been issued to residents of the city who are primarily but not exclusively local business or professional persons who desire the kind of facilities for food, drink and entertainment which the Club furnishes. The cards entitle the holders and the members of their families to admission to the Club. No formal application for membership is required. It is granted upon the recommendation of a member or upon the request of an applicant or upon the acceptance of an invitation to become a member issued by the management. In case of doubt as to the suitability of an applicant other members of the Club may be consulted before the membership card is issued but usually no such investigation is needed. Admission of non-members is granted at the request of other members who may or may not accompany the non-member. This

practice is followed in extending the privileges of the Club to the patrons of a motel in the city upon the request of the operator of the motel who is a card-carrying member of the Club.

"Reason for restricting admission to the Club is found in the fact that the operations of the business involve violations of the liquor laws of West Virginia. The sale of alcoholic liquors at wholesale and retail in the state is a state monopoly. They may be sold at retail only through state stores and agencies of the West Virginia Liquor Control Commission. West Virginia Code of 1955, Section 5907(29). A person may not drink alcoholic liquor in a public place or tender a drink of alcoholic liquor to another person in a public place. Section 5907(90). If the business of Club Ramon as above described be regarded as conducted in a public place within the meaning of the West Virginia statutes the use of alcoholic liquor by the patrons on the premises is a violation of the law. That the sale of alcoholic liquors regularly takes place is evidenced by the fact that the Club acquired a stamp denoting the payment of a special tax to the United States which is required of retail dealers in liquor under 26 U.S.C. Section 5121 and 5122."

B. Public Versus Private

With respect to whether the Club Ramon was public or private, the record reveals the following:

Six individuals, all of whom were members of the Club Ramon (Laufer, R. 15; Williams, R. 25; Fuqua, R. 36; Murray, R. 60; Sowers, R. 83; Tabor, R. 93), testified that they had seen non-members denied admission to the premises (R. 20, 31-32, 40-41, 61, 83-84, 96-97). Four employees (Hall, R. 137; Jefferson, R. 159; Harris, R. 169; Cruise, R. 177), testified that they regularly prevented unaccompanied non-members from entering the premises (R. 139-141, 159, 174-176, 179). The existence of a Club Ramon membership list on the premises was established (R. 149, 179).

The Government produced three non-members (Cave, R. 239; Dingess, R. 243; Collins, R. 250) who testified to having been admitted (R. 238-239, 244; 251); two non-members (Budner, R. 259, whose partner, Fox, was a member, R. 264; Garrett, R. 275), who testified that, while they had been admitted on some occasions, they had been excluded on others (R. 260, 265, 276); and one dues-paying member (Bates, R. 279, 284) who had never been asked for a card, because "They knew I was a member so I was never asked" (R. 279).

On that state of the record, the trial judge instructed the jury as follows (R. 322, 324, 326, 327-328):

> "The only remaining issue, and the only issue really for you ladies and gentlemen of the jury to decide is whether this was a public place wherein these facilities were made available. The question before you, and I think the evidence here in this case, has been solely directed at one issue, and that is was the Club Ramon during this period a place that afforded these facilities for the public generally or was it in fact, as contended by the plaintiff, a private club.
>
> . . . . . .
>
> "I stated a moment ago that the issue in this case is a narrow one, and that is was the Club Ramon private or public. Now, the defense is that it is a club. That is a defense on the issue of whether it is public or private. Whether or not it is a club is not the issue. Whether it is a club or not may be evidence bearing on the issue, but the principal issue — and this is the thing you must remember when you go to your jury room — the issue is was it public or private within the purview of this statute.
>
> . . . . . .
>
> "Of course, you have at one end of the pole you might say, a club that is owned by the members, they pay dues, they pay initiation fees, they vote on the members, they have a board of governors, all of those elements. The sum total of those elements would prove to you that it was private, but the absence of those things does not necessarily mean that it is public.

"The absence of them is to be considered by you in reaching the conclusion whether it was public or private. The absence of voting members does not prevent you from finding that that club was in fact private and not public. The fact that the membership was large does not necessarily indicate that it was public rather than private. The fact that Mr. Matte solicited new members for the club, and even though there were no formal applications and no formal system of approval other than Mr. Matte's own choice is not conclusive as to whether it is public or private.

"I think I have already mentioned that the fact that dues were not paid should not be necessarily considered conclusive on the issue. As I stated a moment ago, it is up to you as members of the jury to decide from this evidence whether the sum total of what was present, or what was absent, equals in your minds a facility that was open to the public or a facility that was private.

• • • • • • • • • •

"I have stated a number of things. I have said the absence of those things or the presence of them would not be conclusive. You should weigh that against what you know to be the normal elements or attributes of a private club, and you have got to put one against the other and weigh it in reaching your determination, bearing in mind, however, that the issue in the case is whether it was public as against private.

"The fact that on occasion individuals who were neither members nor guests of members got into the club through inadvertence would not be determinative that it was public. That can happen in any club, but if it was a regular practice, if you find that it was a regular practice to permit people other than members and bona fide guests, then under this law you would have to return a verdict for the defendant.

"Let me say one more thing, that the fact that all of the members of the public were not permitted to go in there would not make it private. In other words, any man running any business has a choice to discriminate between the people that he permits to come in and enjoy his facilities, as against those that he denies the enjoyment of those facilities, and the mere fact

> that you develop a discriminating clientele, we will say, for a business does not make it private within the purview of this statute."
>
> "It must go beyond that and be a bona fide membership proposition in a club that produces in your mind essentially a private nature, members and the bona fide guests."

As has been indicated, the jury returned a verdict for the taxpayer (R. 330), and judgment was entered thereon (R. 331-333).

The court of appeals, however, disregarding decisions to the contrary and citing none in accord—held that (*infra*, p. A5) "the Club Ramon is so clearly a public place within the meaning of the Federal Statute that a verdict for the United States should have been directed." Accordingly, it reversed the judgment of the district court, with directions to dismiss taxpayer's complaint.

REASONS FOR GRANTING THE WRIT

The decision below is concededly in conflict, not only with the decision of the Ninth Circuit in *United States* v. *Lambeth*, 176 F. 2d 810, but also with the decisions of every district court and of every district judge ever considering the same issue. *Naylor* v. *United States*, 102 F. Supp. 309 (S.D. Calif.); *Schrader* v. *O'Malley*, 119 F. Supp. 627 (D. Neb.); *Bomber Club* v. *Brodrick*, 54-2 U.S. Tax. Cas. ¶ 49,054 (D. Kan.; Chandler, J.); *Southland Club* v. *Brodrick*, 56-2 U.S. Tax Cas. ¶ 9931 (D. Kan.; Wallace, J.); *Uptown Club* v. *United States*, 58-1 U.S. Tax Cas. ¶ 15,154 (D. Kan.; Savage, J.); *Wynn's Trio Club* v. *Koehler*, 58-2 U.S. Tax Cas. ¶ 15,159 (D. Kan.; Hill, J.). The decision now sought to be reviewed stands alone, as indeed the court below frankly admits (*infra*, p. A6).

In every one of the other cases just cited, the "club" in question was a proprietorship that could not possibly qualify under § 101(9), I.R.C. 1939. Yet in every one of those cases, since admission was in fact restricted to card holders or to a group otherwise limited (i.e., as in the *Bomber*

Club case, to the employees of a single company, identified by their employment badges), the establishment was held not to be one furnishing a "public performance for profit" within § 1700(c), I.R.C. 1939, because in fact it was not a "public place" as referred to in that provision, the general public being excluded in each instance. And in the *Lambeth* case, the fact that the "club" label had a clear relationship to avoidance and indeed violation of State liquor laws was held immaterial to the particular establishment's liability to the Federal cabaret tax imposed by § 1700(c). See also the *Southland Club* case, where the report reflects that the premises had been raided by the State's Attorney General.

The conflict of decisions created by the decision below is therefore sharp and clear, incapable of being distinguished away. And, inasmuch as the provisions of the 1939 Internal Revenue Code here in question have been reenacted in substantially the same form in the 1954 Internal Revenue Code, the questions in this case are certain to arise again, as indeed they have in the past. Thus, as Appendix C hereto shows, *infra*, pp. A10-A13, § 101(9), I.R.C. 1939, is now §§ 501(a) and 501(c)(7) of I.R.C. 1954; while former § 1700(c) has become §§ 4231(6) and 4232(b) of the later compilation. The conflict is therefore a live one, which should be resolved by this Court.

There is accordingly no need to argue the present taxpayer's position at length in this Petition. But we cannot forbear to point out that the court below went astray because it proceeded to insert into the "public place" requirement of § 1700(c) what Congress itself never placed there, namely, the notion that unless a particular establishment can qualify as a tax-exempt club under § 101(9), it must as a matter of law be deemed a public place, and, also as a matter of law, cannot qualify as a private place. Otherwise stated, the vice of the ruling below is that it rewrites the applicable tax legislation by main force. We think that the present is preeminently a case for the application of the First Circuit's standard, recently enunciated

in *Fabrecka Products Co. v. Commissioner*, 294 F. 2d 876, 879, viz., "Granting the Government's proposition that these taxpayers have found a hole in the dike, we believe it one that calls for the application of the Congressional thumb, not the court's."

Not only did the Fourth Circuit fail to heed that admonition, but in the process it set aside a jury verdict, which, having been rendered on sharply conflicting evidence (*supra*, pp. 6-7) upon proper instructions, should have been respected. In saying (*infra*, p. A6) that "Actually the restrictions involved in the card carrying practice were no more severe than those imposed by other public places of entertainment from which, for one purpose or another, certain classes of the general public are customarily excluded," the Court of Appeals effectively ousted the jurors from the jury-box, and substituted its own evaluation, not only of the evidence of record, but of evidence outside the record as well.

CONCLUSION

By rewriting the Internal Revenue Code in terms of its own preferences, the court below has created a conflict of decisions that will continue and that accordingly requires resolution. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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JANUARY 1962.

APPENDIX A

OPINIONS BELOW

(1) Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8412

CLUB RAMON, INC.,
Appellee,

versus

UNITED STATES OF AMERICA,
Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Bluefield, John A. Field, Jr., District Judge.

(Argued October 11, 1961. Decided November 15, 1961.)

Before SOPER, BOREMAN and BELL, Circuit Judges.

John F. Palmer, Attorney, Department of Justice, (Louis F. Oberdorfer, Assistant Attorney General; Meyer Rothwacks and Robert N. Anderson, Attorneys, Department of Justice, and Duncan W. Daugherty, United States Attorney, on brief) for Appellant, and LeRoy Katz (Katz, Katz and Kantor on brief) for Appellee.

SOPER, Circuit Judge:

The United States appeals from a judgment of the District Court, based on the verdict of a jury, that the Club

Ramon, Inc, is entitled to a refund in the amount of $386.65 for taxes paid by it under Section 1700(c) of the Internal Revenue Code of 1939, as amended by Section 622 of the Revenue Act of 1942 Chapter 619, 56 Stat. 798, and by Section 3 of the Public Debt Act of 1944, 58 Stat. 272.*

The statute imposes a tax of 20% on amounts paid for admission or refreshment at "any roof garden, cabaret or other similar place furnishing a public performance for profit". The quoted phrase is defined to include "any room in any hotel, restaurant, hall or other public place where music and dancing privileges * * * are afforded the patrons in connection with the serving or selling of food [or] refreshment." The issue submitted to the jury was whether the business of the Club was conducted in a public place as defined in the statute and the jury found for the plaintiff and against the United States. This appeal is based upon the rejection of a motion of the United States offered at the conclusion of the evidence for a directed verdict on the ground that there is no showing in the evidence that the Club Ramon was a bona fide club operated in a private place but on the contrary was an enterprise conducted for profit in a public place where its patrons were afforded entertainment for which they paid. In our judgment, based on the evidence outlined below, the motion for directed verdict should have been granted.

Club Ramon, Inc. is a corporation established under the laws of West Virginia on October 13, 1951. It is, in effect, a one-man enterprise owned by Raymond O. Mattee and carried on by him for profit in Bluefield, West Va. At its inception 20 shares of stock of the par value of $100 per share were issued of which 18 shares were issued to Mattee,

* The amount sued for represents the payment of excise taxes for the month of October 1951 which was made in order to test the application of the tax to the taxpaying corporation. The total liability assessed against the taxpayer for the period from October 1, 1951 to December 31, 1957 was $24,729.91, consisting of $17,254.98 in taxes, $4,233.98 in penalties and interest of $3,240.95.

1 share to his wife, and 1 share to Dudley E. Cruise who works regularly as a clerk with the Bluefield Supply Company during the day but also acts as assistant to Mattee in the evening in the operation of the Club Ramon. These three persons constituted the Board of Directors of the corporation. Mattee became the President and Treasurer, his wife, Secretary, and Cruise, Vice President. The wife died in 1956 and the position of Secretary has not been since filled.

The certificate of incorporation states that the purpose of the corporation is to operate "a private dinner and supper club for the service of food and beverages." The by-laws of the corporation provide that the club shall be operated as a private club for the use of its members and their guests and that the Board of Directors shall prescribe the requirements for membership and issue appropriate identification to the members. No such regulations, however, have been passed and no attempt has been made to organize a private club in the ordinary meaning of that term. The selection of members has been entirely in the hands of Mattee and the evidence of membership is a membership card issued by Mattee bearing the member's name. The privileges of members consist in the right to have access to the Club and to partake of its entertainment for a price but no meetings of the members are held and the members have no voice in the selection of members, no control of the operation of the Club, and no share in the profits. In short, as witnesses for the taxpayer testified, the Club is Mattee and the profits are his.

The place of business is open after 5:30 P.M. in the evening. The name Club Ramon appears on the canopy over the sidewalk which shelters the entrance. The rooms include a lounge, reading and television room and a dining room containing a small area for dancing. Music is provided by a tape machine, a juke box and an electric organ. Members are permitted to consume alcoholic drinks on the

premises which they may provide themselves and keep in a locker if they desire, or may purchase by the drink from the Club. In these respects the enterprise is similar to the business organization commonly known as a night club which is defined in Webster's New Collegiate Dictionary as "a commercial establishment operating at night to supply food and entertainment to its customers." In fact, the telephone company in Bluefield lists the taxpayer as a night club in its classified directory. Mattee and Cruise testified that they had no knowledge of this listing and that the business was not advertised in any other way.

The contention of Mattee that he does not furnish a public performance and does not operate a public place for entertainment is based almost entirely on restrictions imposed by him upon entrance to his establishment. The outside door of the restaurant is locked and opened only in response to a buzzer and usually but not always admission is restricted to persons bearing a membership card inscribed with their names and to their guests. Approximately 400 membership cards have been issued to residents of the city who are primarily but not exclusively local business or professional persons who desire the kind of facilities for food, drink and entertainment which the Club furnishes. The cards entitle the holders and the members of their families to admission to the Club. No formal application for membership is required. It is granted upon the recommendation of a member or upon the request of an applicant or upon the acceptance of an invitation to become a member issued by the management. In case of doubt as to the suitability of an applicant other members of the Club may be consulted before the membership card is issued but usually no such investigation is needed. Admission of non-members is granted at the request of other members who may or may not accompany the non-member. This practice is followed in extending the privileges of the Club to the patrons of a motel in the city upon the request of

the operator of the motel who is a card-carrying member of the Club.

Reason for restricting admission to the Club is found in the fact that the operations of the business involve violations of the liquor laws of West Virginia. The sale of alcoholic liquors at wholesale and retail in the state is a state monopoly. They may be sold at retail only through state stores and agencies of the West Virginia Liquor Control Commission. West Virginia Code of 1955, Section 5907(29). A person may not drink alcoholic liquor in a public place or tender a drink of alcoholic liquor to another person in a public place. Section 5907(90). If the business of Club Ramon as above described can be regarded as conducted in a public place within the meaning of the West Virginia statutes the use of alcoholic liquor by the patrons on the premises is a violation of the law. That the sale of alcoholic liquors regularly takes place is evidenced by the fact that the Club has acquired a stamp denoting the payment of a special tax to the United States which is required of retail dealers in liquor under 26 U.S.C. Section 5121 and 5122.

In view of all these circumstances we conclude that the Club Ramon is so clearly a public place within the meaning of the Federal Statute that a verdict for the United States should have been directed. The pretense set up in the charter and in the by-laws of the corporation that the organization is a private club has no foundation in fact and is not now urged in support of the judgment of the District Court. Hence, the question is whether a restaurant, which is operated by its owner for profit and for this purpose is open to such members of the general public and their families, without specific qualification, as the proprietor may deem it safe and prudent to admit to a place where violations of the state law are carried on, must properly be described as a public place within the meaning of the statute. We think that the answer must be in the

affirmative when, as in this case, the sale of the privileges of the place was the lifeblood of the business and a large section of the general public was served. Actually the restrictions involved in the card carrying practice were no more severe than those imposed by other public places of entertainment from which, for one purpose or another, certain classes of the general public are customarily excluded.

A contrary conclusion was reached by the court in *United States* v. *Lambeth*, (9 Cir. 1949), 176 F.2d 819, upon which the District Judge in the pending case relied.* Therein it was held that a restaurant operating nominally as a club but maintained by an individual for his own profit and engaged in violation of the state liquor laws was not a public place although it was accessible to almost anyone who desired to join. We are not in accord with this holding for it seems to us to ignore realities which are apparent to the ordinary mind. It is, of course, the duty of the trial judge to leave issues of fact to the determination of the jury but he is not obliged to submit issues as to whose outcome no reasonable doubt can be entertained. "And where the evidence is 'so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury.' * * * The rule is settled for the federal courts, and for many of the state courts, that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial,

* Refunds of excise taxes paid under Section 1700 c) have been granted by District Courts in the following cases in which the facts are more or less similar to those in the case at bar: *Naylor* v. *United States*, (D.C.S.D. Cal. 1952) 102 F.Supp. 309; *Shrader* v. *O'Malley*, (D.C. Neb. 1954) 119 F.Supp. 627; *Bomber Club, Inc* v. *Brodrick*, 54-2 U.S.T.C. Par. 49,054; *Southland Club, Inc.* v. *Brodrick*, 56-2 U.S.T.C. Par. 9931; *Uptown Club, Inc.* v. *United States*, 58-1 U.S.T.C. Par. 15,514; *Wynn's Trio Club, Inc.* v. *Kohler*, 58-2 U.S.T.C. Par. 15,159.

it is the duty of the judge to direct the jury to find according to the views of the court. Such a practice, this court has said, not only saves time and expense, but 'gives scientific certainty to the law in its application to the facts and promotes the ends of justice.' * * * The scintilla rule has been definitely and repeatedly rejected so far as the federal courts are concerned. * * *" *Penna. R. Co.* v. *Chamberlain*, 288 U.S. 333, 343. And see *Wachovia Bank and Trust Co.* v. *United States* (4 Cir. 1961) 288 F.2d 750, 757; *Wright* v. *Grain Dealers Nat. Mut. Fire Ins. Co.*, (4 Cir. 1950) 186 F.2d 956, 958.

Cases similar to the instant one may well arise in which the evidence presents the factual question, appropriate for jury resolution, as to whether the activities sought to be taxed are public or private. The determination in each case must depend on the force and character of the evidence there presented. What we hold here is that the facts in this case establish beyond reasonable dispute that the Club Ramon, Inc., in its organization and operation, is no more private than the ordinary discriminating restaurant, and that it is, therefore, liable for the taxes imposed.

The judgment of the District Court is reversed with direction to dismiss the complaint.

Reversed.

(2) Opinion of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
Charleston 29, West Virginia

Chambers of John A. Field, Jr., District Judge
February 8, 1961

Percy H. Brown, Esquire, Assistant U. S. Attorney, Charleston, West Virginia.

LeRoy Katz, Esquire, Attorney at Law, Bluefield, West Virginia.

Re: Club Ramon, Inc. v. United States of America
Bluefield Civil Action No. 629

Gentlemen:

The defendant herein has filed a motion to set aside the verdict of the jury in this case and to enter judgment for the defendant in accordance with its motion for a directed verdict pursuant to Rule 50, F.R.C.P. The defendant also moves in the alternative that it be granted a new trial.

With respect to the motion for judgment n.o.v., I am of the opinion that when the evidence is reviewed in the light most favorable to the plaintiff, unquestionably the motion must be denied. The defendant takes the position that since the Club Ramon failed to meet the criteria of a private club such as those required by Section 101 (9) and Section 4710 of the Internal Revenue Code of 1939, the plaintiff therefore failed to prove that the establishment was furnishing a private as contrasted to a "public performance for profit" within the meaning of Section 1700 (e) of the Code. With this contention I cannot agree. The issue in this case was whether the performance was public or private, and the various elements incident to the organization or conduct of the club were merely of an evidentiary nature to be considered by the jury in resolving the principal issue. That issue was one of fact, and, to my mind,

the jury's verdict was supported by substantial evidence. See *U. S. v. Lambeth*, 176 F. 2d 810.

I must likewise deny the motion to grant a new trial inasmuch as a review of the evidence in its entirety convinces me that the jury's verdict was proper upon the evidence and charge of the Court.

Counsel will prepare an appropriate order compatible with this ruling, making this letter a part thereof by reference.

Very truly yours,

JOHN A. FIELD, JR.
United States District Judge

APPENDIX B

JUDGMENT BELOW

[Caption Omitted]

APPEAL FROM the United States District Court for the Southern District of West Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the Southern District of West Virginia, at Bluefield, with direction to set aside the verdict and dismiss the complaint in accordance with the opinion of the Court filed herein. November 15, 1961.

MORRIS A. SOPER
United States Circuit Judge.

APPENDIX C

STATUTES INVOLVED

1. Section 101(9) of the Internal Revenue Code of 1939, as amended, provided as follows:

> **"§ 101. Exemptions from tax on corporations**
>
> Except as provided in paragraph (12) (B) and in supplement U, the following organizations shall be exempt from taxation under this chapter—
>
> • • • • • • • • •
>
> "(9) Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder;"

2. Sections 504(a) and 501(c)(7) of the Internal Revenue Code of 1954 provide as follows:

> **"§ 501. Exemption from tax on corporations, certain trusts, etc.**
>
> **"(a) Exemption from taxation.**—An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502, 503, or 504.
>
> • • • • • • • • •
>
> **"(c) List of exempt organizations.**—The following organizations are referred to in subsection (a):
>
> • • • • • • • • •
>
> "(7) Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder.".

3. Section 1700 (e) of the Internal Revenue Code of 1939, as amended, provided as follows:

"§ 1700. Tax.

"There shall be levied, assessed, collected, and paid—

* * * * * * * * *

"(e) **Tax on cabarets, roof gardens, etc.**—(1) Rate. A tax equivalent to 20 per centum of all amounts paid for admission, refreshment, service, or merchandise, at any roof garden, cabaret, or other similar place furnishing a public performance for profit, by or for any patron or guest who is entitled to be present during any portion of such performance. The term 'roof garden, cabaret, or other similar place' shall include any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment or merchandise. In no case shall such term include any ballroom, dance hall, or other similar place where the serving or selling of food, refreshment, or merchandise is merely incidental, unless such place would be considered, without the application of the preceding sentence, as a 'roof garden, cabaret, or other similar place'. A performance shall be regarded as being furnished for profit for purposes of this section even though the charge made for admission, refreshment, service, or merchandise is not increased by reason of the furnishing of such performance. No tax shall be applicable under paragraph (1) or (3) of subsection (a) on account of an amount paid with respect to which tax is imposed under this subsection.

"(2) **By whom paid.** The tax imposed under paragraph (1) shall be returned and paid by the person receiving such payments."

4. Section 4231(6) of the Internal Revenue Code of 1954, as amended, provides in pertinent part as follows:

"§ 4231. Imposition of tax

"There is hereby imposed:

• • • • • • • • •

"(6) **Cabarets.** A tax equivalent to 10 percent of all amounts paid for admission, refreshment, service, or merchandise, at any roof garden, cabaret, or other similar place furnishing a public performance for profit, by or for any patron or guest who is entitled to be present during any portion of such performance. The tax imposed under this paragraph shall be returned and paid by the person receiving such payments; except that if the person receiving such payments is a concessionaire, the tax imposed under this paragraph shall be paid by such concessionaire and collected from him by the proprietor of the roof garden, cabaret, or other similar place. No tax shall be applicable under paragraph (1) or (2) on account of an amount paid with respect to which tax is imposed under this paragraph."

5. Section 4232(b) of the Internal Revenue Code of 1954, as amended, provides as follows:

"§ 4232. Definitions

• • • • • • • • •

"(b) **Roof garden, cabaret or other similar place.** The term 'roof garden, cabaret, or other similar place,' as used in this chapter, shall include any room, in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise. In no case shall such term include any ballroom, dance

hall, or other similar place where the serving or selling of food, refreshment, or merchandise is merely incidental, unless such place would be considered, without the application of the preceding sentence, as a 'roof garden, cabaret, or other similar place.' Such term does not include any place if

"(1) no beverage subject to tax under chapter 51 (distilled spirits, wines, and beer) is served or permitted to be consumed;

"(2) only light refreshment is served;

"(3) where space is provided for dancing, no charge is made for dancing; and

"(4) where music is provided or permitted, such music is (A) instrumental or other music which is supplied without any charge to the owner, lessee, or operator of such place (or to any concessionaire), or (B) mechanical music."

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No. 692

In the Supreme Court of the United States

OCTOBER TERM, 1962

CLUB RAMON, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

LOUIS F. OBERDORFER,
Assistant Attorney General,

DAVID O. WALTER,
Attorney,
Department of Justice,
Washington 25, D. C.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Raymond O. Matte owns substantially all the stock of the petitioner corporation and, through it, owns and operates the Club Ramon in Bluefield, West Virginia. The Club provides dancing facilities and sells food and alcoholic beverages. West Virginia law forbids the sale or consumption of alcoholic beverages in a "public" place, but the petitioner purports to operate, as described in its charter, a "private dinner and supper club." The front door is kept locked

and, with some exceptions, only persons bearing "membership" cards and their guests are admitted. Issuance of membership cards is controlled entirely by Matte, who issues them upon the recommendation of another cardholder or upon the request of the applicant himself. No formal application is required; no dues are paid;* and the "members" have no voice in the management of the Club or any right to share in its assets or profits. The Club is admittedly a commercial enterprise operated solely for private profit.

The court of appeals, setting aside a jury verdict for petitioner, held that the Club constituted a "cabaret * * * furnishing a public performance for profit" within the meaning of § 1700(e) of the Internal Revenue Code of 1939 and hence that petitioner was liable for the so-called "cabaret tax" imposed by that section. Petitioner contends, as the sole basis for certiorari, that the holding that the Club was a "public" rather than "private" place is in conflict with the decision of the Court of Appeals for the Ninth Circuit in *United States* v. *Lambeth*, 176 F. 2d 810, in which the court refused to set aside a contrary finding of a trial court on somewhat similar facts.

The *Lambeth* case, in our view, was erroneously decided, and we would welcome the opportunity to

---

* One witness stated that he had at one time paid a $10 fee but that he did not know whether it was dues or rent for a locker in which he kept a liquor bottle (R. 283-285). Matte testified, however, that he had never charged dues (R. 231).

have it overturned by this Court. Proprietors generally have the right to exclude persons seeking admission, and that that right is exercised in the form of giving admission cards (so-called "membership" cards) to those the proprietor chooses to admit cannot, by itself, be enough to make the establishment nonpublic in the statutory sense. We do not believe, however, that there exists between the decision below and the *Lambeth* case a conflict of the sort required to warrant review by this Court.

The court in the *Lambeth* case made no attempt to define "public" as used in the statute and held simply that, on all of the facts of that case, the finding of the trial court that the establishment was not "public" was not clearly erroneous. A decision so based—simply an *ad hoc* application of an undefined statutory term to particular facts—carries little force beyond its precise facts, and even a slight variation in the facts precludes a "conflict" in the strict sense required to justify review by this Court of such a narrow and relatively unimportant tax question. Such a difference of facts exists here. In *Lambeth*, one could become a "member" only by paying $3 annual dues ($0.50 for servicemen); in this case, there was no requirement for the payment of "dues". We do not contend that such a nominal dues requirement should be determinative; rather we agree with the court below that *Lambeth* is wrong notwithstanding that difference. It remains, nevertheless, a factual difference on which a difference of result might be predicated and it is therefore sufficient to preclude a claim of conflict.

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

DAVID O. WALTER,
Attorneys.

March, 1962.

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